

FINAL STATEMENT OF REASONS

Amendment to California Code of Regulations, title 15, section 2041 Review of Proposed Decisions

The proposed regulatory amendment modifies the process by which the Board of Parole Hearings (board) reviews hearing panel decisions granting or denying parole to life prisoners. The board continues existing practices with the chief counsel or designee reviewing all grants of parole. The policy being adopted is that a random sampling of denials of parole will be reviewed by the chief counsel or designee. This ensures that quality control standards are consistently met.

The rate of the random sample will be determined by the board. In statistical terms a simple 'random sample' is a set of items that have been drawn from a population in such a way that each time an item was selected, every item in the population had an equal opportunity to appear in the sample. The board is using the term 'random sample' in the ordinary simple sense and is not interpreting it to have any specialized meaning.

The overall purpose of random sampling of hearings denying parole is to provide quality assurance of the hearing process so as to assure basic fairness. Three specific goals have been identified for achieving that purpose: (1) consistency with substantive suitability criteria, (2) consistent and complete process of notice, documents and hearing record, and (3) due process of law providing a fair hearing.

Standards for review are set forth in Penal Code § 3041(b), which provides in pertinent part,

The panel's decision shall become final pursuant to this subdivision unless the board finds that the panel made an error of law, or that the panel's decision was based on an error of fact, or that new information should be presented to the board, any of which when corrected or considered by the board has a substantial likelihood of resulting in substantially different decision upon a rehearing.

Existing board regulations provide standards for decision review, so those need not be duplicated in § 2041(h). See title 15, California Code of Regulations (CCR), § 2042, which provides as follows.

§ 2042. Review Criteria

The purpose of the decision review process is to assure complete, accurate, consistent and uniform decisions and the furtherance of public safety. Criteria for disapproval of a decision include a determination by the board that the panel made an error of law, or that the panel's decision

was based on an error of fact, or that new information should be presented to the board, any of which when corrected or considered by the board, has a substantial likelihood of resulting in a substantially different decision upon a rehearing. In deciding if a decision should be approved, board staff shall review the information available to the panel that made the decision and any information received as provided in 2028.

This review process will foster consistency of standards in providing requisite notice to necessary parties, access to documents and a complete record of the proceeding to promote fair and complete hearings. It will also enable the Board to rectify errors of fact or law which culminated in denial of parole to the inmate.

ALTERNATIVE DETERMINATION

The board has determined that no reasonable alternatives identified or considered would be more effective in carrying out the purpose for which the action is proposed, or would be as effective as and less burdensome than the proposed regulatory action.

LOCAL MANDATE DETERMINATION

The proposed regulation does not impose any mandate on local agencies or school districts, or a mandate, which requires reimbursement pursuant to Part 7 (Section 17561) of Division 4.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY PUBLIC COMMENT PERIOD FROM OCTOBER 12, 2007 THROUGH NOVEMBER 26, 2007

Comment #1:

The proposed regulation creates a politically driven two-tiered review system as all grants of parole shall be reviewed while only some denials of parole shall be reviewed.

Response:

Given the legitimate public interest in parole matters, the Board adopted the proposed standard with the goal of striking the optimal balance between protecting public safety by reviewing parole grants of prisoners convicted of the most serious types of crimes and allowing flexibility reviewing parole denials to ensure quality and uniformity of decisions. Additionally, the inmates and their counsel unilaterally bring perceived errors to the board's attention and trigger decision review of a denial that was not selected as part of the random sample.

Accommodation: None

Comment #2:

When the Legislature delegates a power to a body such as the board, that power can only be exercised through a collective decision of the board. The board lacks the power, absent legislative authorization, to delegate its discretionary power to others, such as the chief counsel or a designee

Response:

The regulation specifies that certain functions are provided by the Board's 'chief counsel.' The office of the chief counsel acts in consultation with the Board and functions in conjunction with the Board's decision review committee to make recommendations for board action on hearing panel decisions during the 120-day decision review period. The 'chief counsel' is acting as the board's representative. The re-organization of the Youth and Adult Correctional Agency under Senate Bill (SB) 737 merged the board, the Department of Corrections and their staffs such as the office of the chief counsel into the successor entity. Also, in fact the proposed changes to the board regulation do not expand the existing role of the chief counsel and merely continue the policy authority of the board, i.e. to determine the random sample of parole denials that shall be reviewed by the chief counsel or designee.

Accommodation: None

Comment #3:

The Board's website does not clearly describe the status of the regulation change and a 45-day notice has not been issued.

Response:

The Board website listed the topic Review of Life Prisoner Decision under the heading of proposed regulations. This provided the public advance notice along with the published meeting agenda on the website that the Board was going to consider the regulation proposal and the public would have an opportunity to comment on the initial proposal before it was published for the 45-day public comment period. Therefore, all notice requirements applicable for that stage of the process were met.

Accommodation: None

Comment #4:

The random sampling review of parole denials is discretionary and there are no standards defining it. The term is too vague and general to be meaningful. The regulation should be specific and include the sample design or plan for selecting the random sample.

Response:

The review of parole denials is not discretionary by the chief counsel since the regulation specifies that “a random sample of parole denials, as determined by the board, shall be reviewed by the chief counsel or a designee” [emphasis added]. The board retains the authority and discretion to determine what the random sample shall be.

The policy being adopted is that a random sample of the parole denial decisions will be reviewed by the chief counsel or designee. The rate of the random sample will be determined by the Board. In statistical terms a simple ‘random sample’ is a set of items that have been drawn from a population in such a way that each time an item was selected, every item in the population had an equal opportunity to appear in the sample.

Accommodation: None

Comment #5:

The chief counsel is an employee with primary loyalty to the Department of Corrections (department). This presents a conflict of interest with the board given that department has a different set of objectives with respect to inmates than does the board.

Response:

It is a legislative prerogative to determine whether the board, in performance of its duties, must have legal advice separate from the department’s Office of Legal Affairs. The stated purpose of SB 737 was to reorganize the Youth and Adult Correctional Agency and its component parts for governmental efficiency and not to substantially alter the statutory functions being provided. Additionally, since the chief counsel is an attorney, he or she is bound by the California Business and Professions Code and ethical cannons to zealously protect the confidences and represent the interests of their client within the bounds of the law. There has been no evidence presented that the legal staff serving the board, including the chief counsel, has acted against the interests of the board in any specific circumstances due to this relationship.

Accommodation: None

Comment #6:

The Notice of Proposed Rulemaking is deficient because it does not include a copy of the proposed amended text. A copy of the text must be sent to all prisoners that received a notice and the comment period must be extended.

Response:

Government Code § 11346.5 specifies the contents of the Notice Regarding Proposed Regulatory Action and they do not include a copy of the regulation text. In fact, section

11346.5(b) provides that the agency contact person identified in the notice “shall make available to the public upon request the express terms of the proposed action.”

In this rulemaking the board has met the minimum statutory requirements. The board’s current practice provides both the text and Initial Statement of Reasons when the Notice is sent to people on the regulation mailing list in order to afford convenience to the prisoners and the public who might wish to comment.

Accommodation: None.

Comment #7:

The term "reviewed" is insufficient as it does not address how parole denials will be reviewed and how they will be processed after review. Review criteria and procedures should be made part of the regulation. The proposed regulation conflicts with the last four sentences of Penal Code § 3041(b).

Response:

The standards for decision review are adequately set forth in existing board regulations. See 15 CCR§ 2042, which provides as follows.

§ 2042. Review Criteria

The purpose of the decision review process is to assure complete, accurate, consistent and uniform decisions and the furtherance of public safety. Criteria for disapproval of a decision include a determination by the board that the panel made an error of law, or that the panel's decision was based on an error of fact, or that new information should be presented to the board, any of which when corrected or considered by the board, has a substantial likelihood of resulting in a substantially different decision upon a rehearing. In deciding if a decision should be approved, board staff shall review the information available to the panel that made the decision and any information received as provided in 2028.

Accommodation: None

Comment #8:

The proposed regulation mandating review of all grants and some denials conflicts with PC § 3041(b) as the latter permits but does not mandate review of panel decisions. The regulation should offer a justification or explanation for this discrepancy.

Response:

The statute permits the board to review any of its decisions before they become final. The regulation amendment to § 2041, subdivision (h) is a proper exercise of the board's discretion under statute to specify that it shall review all grant and some denial decisions concerning parole suitability for life prisoners. Given that the board's decision review resources are finite, and there were 6,685 scheduled hearings in Fiscal Year 2006/2007, the board properly sets parameters for review. Also see response to Comment #1, above.

Accommodation: None

Comment #9:

The proposed regulation conflicts with PC § 3041(a) as "shall normally" means more than 50%. The board should review grants and denials in the same proportion. The regulation is not consistent with the Penal Code because the board arbitrarily determines some parole decisions are more important than others and its purpose is to deny parole grants and not reverse denials.

Response:

The comment refers to statutory language in PC § 3041(a) ["shall normally"] concerning a hearing panel consideration of granting parole to a life prisoner during a suitability hearing. In PC § 3041(b) the statute sets forth standards guiding the determination of parole suitability. The statute in 3041(b) does not apply the "shall normally" language from 3041(a) to the board's discretion to review hearing panel decisions. The comment fails to explain the assertion why that language from PC §3041(a)--'shall normally'--should mean 'more than 50%' in connection with review of a parole decision.

The California Supreme Court case In re Dannenberg, 34 Cal. 4th 1061, 1078, 23 Cal. Rptr. 3d 417, 430 (2005) explains that California does not have a presumptive release scheme within its statutes or guidelines. In accord, the court, at pages 429-430, concludes as follows. "Applying these principles, we first note the obvious. The words of section 3041 strongly suggest that the public-safety provision of subdivision (b) takes precedence over the "uniform terms" principle of subdivision (a)."

There is no support for the comment's assertions that the board determines some parole decisions as more important than others and that decision review's purpose is to deny parole grants and not reverse denials. The Board uses its resources to perform decision review in accord with applicable legal standards rather than any alleged conspiracy violating the law in order to keep prisoners incarcerated. See also agency response to comment #1, above.

Accommodation: None

Comment #10:

In addition to the three options of affirming, ordering a new hearing, or modifying the proposed decisions, the proposed regulation should be amended to allow a fourth option such as "other" to be used by reviewers.

Response:

The comment fails to specify what 'other' would be that is not already included within the three options provided. The existing option of modifying a proposed decision encompasses a broad array of minor alterations which might fit under a category titled as 'other.'

Accommodation: None

Comment #11:

The proposed regulation conflicts with California Constitution. The board's decision becomes final 120 days after the date of the parole grant. The California Constitution, Article V, Section 8(b) provides the board's decision shall not become final until an additional thirty days for gubernatorial review has lapsed. Accordingly, the board's decision cannot become final until 150 days from the date of the parole grant.

Response:

The commenter's erroneous paraphrase of the Constitutional provision creates an apparent conflict where none actually exists. The cited constitutional provision states that the board decision concerning parole of persons convicted of murder will not be effective for a period of 30 days to allow Governor's review. PC § 3041(b) notes that the board's decision will become final 120 days after the date of the hearing. The regulation repeats the penal code provision. The constitution, statute and regulation are in harmony. The board's proposed decision becomes a final board action by the 120th day after the hearing. The Governor's review under Penal Code §§ 3041.1 and 3041.2 are separate, independent processes that may result in the inmate being referred to a rescission hearing under Penal Code section 3041.1 or vacating the grant under Penal Code section 3041.2

Accommodation: None

Comment #12:

Subsection (i) of the proposed regulation should be amended to allow for a longer period of time between parole consideration hearings.

Response:

This comment is not directed at the proposed action [amending 2041(h)—review of life prisoner decisions] nor the rulemaking procedures followed. However, the board notes the commenter’s proposal is unnecessary given that a current board regulation--15 CCR 2253(d)—allows the prisoner to stipulate to a period of unsuitability and therefore achieve the requested purpose—extending the period before the next parole consideration hearing.

Accommodation: None

Comment #13:

Subsection (k) of the proposed regulation should be amended to include the expedited review of life prisoner decisions. The language of the statute is ambiguous.

Response:

This comment is not directed at the proposed action [amending 2041(h)—review of life prisoner decisions] nor the rulemaking procedures followed. PC § 3041(b) provides that life prisoner hearing decisions become final no later than 120 days after the hearing. While the board has discretion to complete decision review sooner, the complexity and gravity of a decision providing for the immediate release of a life prisoner likely exceeds a 10-day timeframe and thus given the individualized determinations involved any expedited reviews of life prisoner parole decisions are considered on a case-by-case basis.

Accommodation: None.